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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1929.

No. 61.

E. FRANKLIN BREWSTER,
Petitioner,

against

BERT P. GAGE, Collector of Internal Revenue,
Respondent.

BRIEF ON BEHALF OF PETITIONER.

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BERT P. GAGE, Collector of Internal Revenue,
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No. 61.

BRIEF ON BEHALF OF PETITIONER.

This case comes before the Court on a writ of *certiorari*, issued to the Circuit Court of Appeals for the Second Circuit, in accordance with the order entered May 13, 1929 (R. 33), granting the petition that had been filed on April 4, 1929.

The case involves the right of the petitioner to recover Federal income taxes for the calendar years 1920, 1921 and 1922, claimed by him to have been illegally assessed and collected. In each of those years the petitioner sold certain stocks which he had acquired as one of the five residuary legatees under his father's will. He computed the gains and losses resulting from such sales upon the basis of the value of the securities on April 19, 1920, the date of the order of distribution, but the Commissioner of Internal Revenue recomputed such gains and losses upon the basis of the value on May 20, 1918, the date of the testator's death.

This action was brought to recover such additional taxes paid. The petitioner obtained a judgment in the United States District Court for the Western District of New York, for the sum of $2,711.12 (R. 18, 19), the opinion being re-

ported in 25 Fed. (2nd) 915. The judgment of the District Court was reversed by the Circuit Court of Appeals for the Second Circuit by its order entered February 11, 1929 (R. 30, 31), the opinion being reported in 30 Fed. (2nd) 604.

Statement of the Facts.

The petitioner was one of five residuary legatees under the will of his father, who died May 20, 1918. On April 19, 1920, there was entered in the Surrogate's Court, County of Monroe, City of Rochester, New York, a decree or order of final distribution, whereby the executors were directed to distribute certain property, including the securities subsequently sold, to the petitioner and the other residuary legatees. The distribution of these securities was in lieu of cash payments. The description of the securities sold by petitioner, the years of sale, the sale price, their value at the date of testator's death, and their value at the date the order of distribution was entered, April 19, 1920, were as follows (R. 5, 11, 12):

	Securities	Year Sold	Sale Price	Value at Testator's Death	Value Apr. 19, 1920
22 shs.	Eastman Kodak....	1920	$11,550.00	$9,350.00	$12,100.00
25 "	Lincoln Bank.....	1920	6,250.00	5,500.00	6,875.00
15 "	Am. Chicle pfd.....	1920	944.40	945.00	1,080.00
66 "	Childs Co. com.....	1921	6,257.46	4,290.00	5,940.00
22 "	Bankers Trust Co.	1922	8,024.72	5,398.58	8,514.00
60 "	Gen'l Cigar Co. com. (United Cigar Stores)	1922	4,631.10	2,700.00	4,140.00

These securities were revalued on April 19, 1920, the date of distribution, and it was stipulated that such values were the actual market values on that date (R. 22).

The petitioner reported as the taxable gain realized or the deductible loss sustained upon each of the above sales, the difference between the selling price and the value of the securities at the date of the order of distribution. The Commissioner of Internal Revenue increased the taxable gains and decreased the deductible losses by computing such gains and

losses in each case as the difference between the selling price of the securities and their value at the date of the testator's death. As a result of the adjustments made by him the Commissioner assessed against the petitioner additional taxes for the three years in question as follows: $1,799.68 for 1920; $94.94 for 1921; and $453.59 for 1922, or a total of $2,348.21 (R. 4). This sum, with interest in the amount of $53.69, was paid under protest (R. 4). A claim for the refund of the aforesaid additional taxes and interest, with interest thereon from the date of payment, was duly filed by the petitioner with the Collector and was rejected in its entirety by the Commissioner (R. 4).

Prior to December 31, 1919, the executors had realized net profits on sales in the amount of $50,993.84, and other income in the amount of $77,955.92. During the same period the executors disbursed $336,887.15 for debts; $78,303.03 for estate and inheritance taxes, and $758.38 administration expenses (R. 8).

Likewise, prior to December 31, 1919, partial distributions valued at $567,832.80 (R. 8, 23, 24), were made to the five residuary legatees. However, each legatee's share was not made up of the same items of property. Petitioner received one thousand shares of the common Stock of Brewster Gordon & Company, while the other four legatees received one thousand shares each of preferred stock of that company. Petitioner also received certain cash, silverware, and jewelry, while the other legatees, in lieu thereof, each received certain stocks. The three daughters each received one-third of the household furniture, whereas the two sons received none (R. 23, 24).

During the period January 1, 1920 to April 19, 1920, the executors received income amounting to $10,776.25, and paid debts amounting to $15,174.77 (R. 9), administration expenses and attorneys' fees $25,683.93 (R. 10), and executor's fees $41,951.22 (R. 11).

The Issue Involved.

The sole issue presented is whether the stocks which Brewster sold were acquired by him, within the meaning of Section 213(b) (3) of the Revenue Acts of 1918 and 1921 and Section 202(a) (3) of the Revenue Act of 1921, at the date of the decree of distribution or at the date of the testator's death.

Statutes Involved.

Revenue Act of 1918 (40 Stat. 1060, 1065).

Section 213:

"* * * The term 'gross income'—

(a) includes gains, profits and income derived from * * * commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; * * * or gains or profits and income derived from any source whatever; but

(b) Does not include the following items which shall be exempt from taxation under this title:

* * * * * * * *

(3) The value of property acquired by gift, bequest, devise or descent (but the income from such property shall be included in gross income); * * *."

Section 202(a):

"That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, the basis shall be—

(1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; and

(2) In the case of property acquired on or after that date (a) the cost thereof; or (b) the inventory value if the inventory is made in accordance with section 203."

Revenue Act of 1921 (42 Stat. 229, 237).

Section 213:

"* * * The term 'gross income'—

(a) includes gains, profits, and income derived from * * * commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; * * * or gains or profits and income derived from any source whatever; but

(b) Does not include the following items which shall be exempt from taxation under this tile:

* * * * * * * *

(3) The value of property acquired by gift, bequest, devise or descent (but the income from such property shall be included in gross income); * * *."

Section 202(a):

"That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * * * *

(3) In the case of such property, acquired by bequest or devise or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition."

SYNOPSIS OF ARGUMENT.

I.

The stocks which Brewster sold constitute the property, the basis of which is to be determined, and such stocks were acquired by him on April 19, 1920, the date of the order of distribution, not on May 20, 1918, the date of the testator's death.

A. *The "Property" to which Section 202(a) (3) Refers is the Specific Property Sold by the Residuary Legatee.*

B. *The Time of "Acquisition" of "Such Property" was the Date of the Order of Distribution, and is to be Distinguished from the Acquisition of the Mere Right to a Proper Administration of the Estate which Vested at Death.*

C. *To Hold that the Property Sold was Acquired at the Date of Testator's Death would Result in Increasing or Decreasing a Taxpayer's Income on account of Changes in Value before the Property is Subject to the Disposition and Control of such Taxpayer. This Should Not be Done in the Absence of Clearly Expressed Congressional Intent.*

II.

The legislative history of the statutes in question fully supports the petitioner's construction.

III.

The departmental construction is entitled to no weight in construing the statutes here involved.

IV.

The decision below is not sound; and its construction of the statute leads to inconsistencies and confusion that do not arise under the proper construction.

ARGUMENT.

I.

The stocks which Brewster sold constitute the property, the basis of which is to be determined, and such stocks were acquired by him on April 19, 1920, the date of the order of distribution, not on May 20, 1918, the date of the testator's death.

The Revenue Act of 1918 applies to the year 1920 and the Revenue Act of 1921 applies to the years 1921 and 1922. There is a difference in the language of the two acts in that the basis provisions of the 1921 Act, Section 202(a) contain specific reference to the basis for determining gain or loss upon the sale of property acquired by bequest whereas no such specific reference is found in the 1918 Act. The only basis specifically mentioned in the 1918 Act for property acquired after March 1, 1913, is cost, and in a case of this kind there is no cost in the literal sense of the word. However, the entire proceeds of sale of a bequest does not constitute income because the value of a bequest is capital to a legatee and becomes the basis for determining whether there has been a gain or loss when the bequest is subsequently sold. The additional provision found in the 1921 Act, namely, Section 202(a) (3), is new and serves to make the statute clearer and more definite by specifying that the basic value of property acquired by bequest is its value when acquired. It can hardly be doubted that, whatever may be the conclusion reached under the 1921 Act, it must rationally be the proper conclusion to be reached under the 1918 Act, and it is not apprehended that the Treasury Department is of a different mind.

In view of what has been said above, and of the language of Section 202(a) (3) of the 1921 Act, it is apparent that the narrow question to be answered is: When were the stocks which Brewster sold in 1920, 1921, and 1922 "acquired" by him within the intendment of the statutes here involved?

A.

The "Property" to which Section 202(a) (3) Refers is the Specific Property Sold by the Residuary Legatee.

The language of the statute is explicit with regard to the property to be valued. After stating the general rule that the basis for ascertaining the gain or loss upon a sale of any "property" shall be the cost of "such property", it provides:

> "In the case of such property, acquired by bequest, devise or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition."

The repeated use of the word *such* modifying *property* and in each instance referring back to the property sold is significant. Without the word *such* in the statute, the ordinary meaning of its language undoubtedly is that the basis to be used in measuring the gain resulting from the sale of property is the cost or basic value of the self-same property that was sold. The use of *such* not only strongly emphasizes that which is obvious, but also goes further and indicates a concern of the law-makers to exclude the possibility of any other or different property whatsoever. This is but proper because, in the absence of some compelling reason, it would be anomalous to permit an inference that the selling price of one article or of one kind of property should be compared with the cost or value of another article or another kind of property in order to ascertain gain or loss. Therefore, the "property", the basic value of which is contemplated by Section 202(a) (3) is the specific property which was sold by the legatee.

B.

The Time of "Acquisition" of "Such Property" was the Date of the Order of Distribution, and is to be Distinguished from the Acquisition of the Mere Right to a Proper Administration of the Estate which Vested at Death.

The meaning of the word *acquire* is not doubtful. Both in common speech and as understood in the law, it means to obtain or receive possession and enjoyment of, to get as one's own.

Webster's Dictionary, Unabridged, thus defines the word:

> "To gain by any means; to *get as one's own,* as to acquire a title." (Italics ours.)

Funk & Wagnalls Dictionary gives this definition:

> "To obtain by search, endeavor, practice, or purchase; *get as one's own;* receive or gain in whatever manner; come to have; * * * ." (Italics ours.)

Bouvier's Law Dictionary defines it as follows:

> *"To make property one's own;* to gain permanently. It is regularly applied to a permanent acquisition. A man is said to obtain or procure a mere temporary acquisition." (Italics ours.)

The Supreme Court of California in the case of *Wulzen* v. *Board of Supervisors,* 101 Cal. 15, 25; 35 Pac. 353, gives this definition:

> " 'To acquire' is, in the law of contracts and descent, *to become the owner of properties; to make property one's own.*" (Italics ours.)

See also: *Ex parte Okahara,* 191 Cal. 353, 216 Pac. 614; *White* v. *Waite,* 47 Vt. 502; *Alexander* v. *Alexander,* 85 Va. 353, 7 S. E. 335; *Matthieson* v. *United States,* 65 Ct. Cls. 484; *Appeal of City Bank Co.,* 1 B. T. A. 210; *Appeal of Matthieson,* 2 B. T. A. 921; *Foster* v. *Commissioner,* 7 B. T. A.

1137; *Moser* v. *Commissioner,* 12 B. T. A. 672; *McGee* v. *Commissioner,* 13 B. T. A. 1181.

Common to all of the above definitions is the idea of making property one's own; and to make property one's own obviously means to become owner of it, to possess it fully, free from any adverse interests of others. And a necessary and indispensable attribute of ownership is the power of disposition.

The specific property sold was not *acquired* by the petitioner when his father died. The long settled common law rule, which has never been changed by any statute or decision affecting this case, is that upon a testator's death, title to personal property not specifically bequeathed, together with the possession, right to collect income therefrom and power to sell, passes to the executor or administrator and not to the residuary legatees, but indeed to the exclusion of such legatees.

> *United States* v. *Jones,* 236 U. S. 106, 112 (1915);
> *Williams* v. *Cobb,* 242 U. S. 307 (1916);
> *Petersen* v. *Chemical Bank,* 32 N. Y. 21, 45 (1865);
> *Matter of Zefita,* 167 N. Y. 280, 283, 60 N. E. 598 (1901);
> *Norton* v. *Lilley,* 210 Mass. 214; 96 N. E. 351 (1911);
> *State* v. *Circuit Court of LaCrosse County,* 177 Wis. 548, 554; 188 N. W. 645 (1922);
> *Schouler on Wills* (6th Ed.), Section 2061;
> *Alexander, Commentaries on Wills* (Vol. 3), Section 1461.

The principle was stated by this Court in *United States* v. *Jones, supra,* as follows:

> "It hardly needs statement that personal property does not pass directly from a decedent to legatees or distributees, but goes primarily to the executor or administrator, who is to apply it, so far as may be necessary, in paying debts of the deceased and expenses of administration, and is then to pass the residue, if any, to legatees or distributees. * * * In a practical sense their in-

terests are contingent and uncertain until, in due course of administration, it is ascertained that a surplus remains after the debts and expenses are paid. Until that is done, it properly cannot be said that legatees or distributees are certainly entitled to receive or enjoy any part of the property. The only right which can be said to vest in them at the time of the death is a right to demand and receive at some time in the future whatever may remain after paying the debts and expenses."

This Court further said, in *Williams* v. *Cobb, supra*, that—

"At common law * * * an executor has full power, without any special provision of the will that he is administering or order of the court, to sell or dispose of the personal assets of the estate, and thereby to pass good title to them."

Schouler says, in Section 2061:

"The *legal and equitable* title to all the personal property of the deceased, including choses in action and incorporeal rights, vests in fact in the executor or administrator, as against *all* others, during the suitable period for administration. * * *." (Italics ours.)

Alexander in his *Commentaries on Wills, supra,* in Section 1461, says:

"The general rule is that the legal title to all personal property of a decedent, including all chattel interests and choses in action, vests in the personal representative, as of the date of the death of the decedent; and *such personal representative has the title and right of possession thereto against the next of kin and legatees until the end of administration and final distribution.*" (Italics ours.)

The New York rule, under which the case at bar arose, is stated in *Petersen* v. *Chemical Bank, supra,* at page 45, as follows:

"The devolution of ownership is direct to the representative, and the beneficiaries take no title in the specific property which the law can recognize."

In contradistinction to the title and rights to possession, usufruct, and disposition, held by the personal representative during the period of administration, the residuary legatee during such period has no title to the personal property and none of the rights which are fully possessed by the personal representative. All that a residuary legatee takes at death is an intangible and unattached right to demand and receive at some time in the future whatever, if anything, may remain after paying taxes of every nature, debts, sundry expenses of administration, and all the other testamentary gifts.

It is noteworthy that, throughout the quotations given above, the exclusion of the legatees from any title is emphasized. In keeping are the following, pointing out the limitations of the right which the residuary legatees acquire upon a testator's death:

United States v. *Jones, supra:*

> "In a practical sense, their interests are contingent and uncertain until, in due course of administration, it is ascertained that a surplus remains after the debts and expenses are paid. Until that is done, it properly cannot be said that legatees or distributees are certainly entitled to receive or enjoy any part of the property. The only right which can be said to vest in them at the time of the death is a right to demand and receive at some time in the future whatever may remain after paying the debts and expenses."

Petersen v. *Chemical Bank, supra:*

> "* * * the beneficiaries take no title in the specific property which the law can recognize."

Matter of Zefita, 167 N. Y. 280, at 283, points out that a residuary legatee could not even maintain an action for recovery of property of the estate which had been converted.

Likewise, *Norton* v. *Lilley,* 210 Mass. 214, holds that if an attorney employed in the administration of an estate robs the estate or neglects his duty to it, "an action cannot be brought by a distributee because he has no title to the personalty

* * *." The distributee's right is merely a "right to have the estate properly wound up and distributed."

It was said in substance, in the opinion below, that at death a residuary legatee acquires equitable title to the property which may eventually be distributed to him. This statement is wholly inconsistent with the authorities. In this connection see particularly *Schouler on Wills,* Section 2061:

> "The *legal and equitable* title to all the personal property * * * vests in fact in the executor or administrator, as against *all* others, during the suitable period for administration * * *." (Italics ours.)

See also, 17 *Columbia Law Review,* 467, where it is maintained that even in the case of a true trust the *cestui* has only a right *in personam* and no right *in rem.*

It may be freely conceded that Brewster acquired something at the date of death, for at that time he acquired a right to an honest administration of the estate and a vested right to participate eventually in the residuum if there should be any. This right is in itself property and if he should sell it his gain or loss would be based upon the value of such right at the time he acquired it, the date of death. *But this right is not the "property", the stocks, which were distributed to him and which he sold in 1920, 1921 and 1922.*

The narrow question of whether specific property, as distinguished from an intangible right to ultimate distribution, was "acquired" by a legatee at testator's death, was considered in *White* v. *Waite, supra,* in which the court was construing the Enabling Act of 1867, which provided that, "All personal property and rights of personal action *acquired* by any married woman during coverture, by inheritance or distribution, shall be held by her to her sole and separate use". It was held that the property received by her was "acquired" at the time of distribution and not at the date of death.

In *Alexander* v. *Alexander, supra,* the Supreme Court of Appeals of Virginia, construing a similar act relating to "all property *acquired* by her during marriage"

held that where a wife was given a vested remainder in real estate and the testator died before her marriage, but the life tenant did not die until after her marriage, she "acquired" the property within the meaning of the statute when she came into possession and not when her remainder vested.

Even if, notwithstanding the foregoing authorities, it could be said that a residuary's right to an honest administration and eventual participation in the residuum constituted an equitable interest in the property held by the executor it would not follow that the property sold by Brewster was *acquired* within the meaning of the income tax acts at the date of death instead of at the date of distribution. In no economic sense was Brewster the owner of the stocks in question while they were beyond his right of enjoyment and power of disposition, subject to sale for debts, and might well have been distributed to some other legatee. The practical matter of taxation should not, in the absence of clear Congressional intent to the contrary, be made to depend upon intangible concepts and theories as to which experts do not agree.

C.

To Hold That the Property Sold Was Acquired at the Date of the Testator's Death Would Result in Increasing or Decreasing a Taxpayer's Income on Account of Changes in Value of Property Before It Is Subject to the Disposition and Control of Such Taxpayer. This Should Not Be Done in the Absence of Clearly Expressed Congressional Intent.

Taxation is eminently practical. It is brought to every man's door and should not depend upon the application of theoretical or abstract ideas which are the subject of dispute and controversy among experts. *Knowlton* v. *Moore,* 178 U. S. 41; *Nicol* v. *Ames,* 173 U. S. 509, 515; *Vanderbilt* v. *Eidman,* 196 U. S. 480. Whether one of several residuary legatees has, during the period of administration, an equitable title to any or all of the property which eventually falls into the residuum is theoretical and controversial. But there is

no controversy over the proposition that during such period he has no right whatever to possess, sell or enjoy any property held by the personal representative and is incapable of designating or identifying which property, if any, shall be distributed to him at the conclusion of administration. The court below has made the measure of a residuary legatee's taxes dependent upon a highly theoretical and controverted concept. On the other hand, the Court of Claims in one case and the Board of Tax Appeals in four cases, both with a background of hearing many tax controversies, have declined to so measure a residuary legatee's tax and have confined the measure to the actual, practical situation by basing the gain or loss upon the value at the date of distribution. *Matthieson* v. *U. S., supra; Appeal of Matthieson, supra; Foster* v. *Commissioner, supra; Moser* v. *Commissioner, supra; McGee* v. *Commissioner, supra.*

In the *Matthieson* case the Court of Claims said, page 496:

> "It is difficult to conceive that Congress, in using the language 'the value of property acquired by * * * bequest', intended to fix irrevocably a value at the date of testator's death when by the very nature of the event it was incapable of ascertainment, speculative, and dependent finally upon a course of legal proceedings which must be first observed before it may be fixed."

In the case of the same name the Board of Tax Appeals had the following to say:

> "From the authorities cited it appears that, although the taxpayer had a right to the proper administration of the estate and to a proportionate share of the residue remaining, he had no right or title in the stock in question until distribution was made by the executors. The date on which he acquired the property in the stock was the date of its distribution, and any amount representing an increase in the value of the stock between the date of the death of the testator and the date of such distribution should not be included in the income of the taxpayer."

Then after pointing out that any income realized during the period of administration is taxable to the estate under Section 219 of the Acts, the Board continued:

> "With reference to the stock in the instant case there was no transaction prior to distribution from which taxable gain resulted, even though it is clear that its value increased during that period and was greater at the time of the distribution than at the time of the death of the testator. This does not affect the income of the taxpayer, inasmuch as Section 213 of the Act excludes from gross income the value of the property as of the date it was acquired, which was the date of distribution."

In the *McGee* case the Board was required to consider the effect of a California statute which vested title to all personalty in the heirs subject to the possession of the personal representative and to the lien for expenses, taxes and debts. Its conclusion is found at page 1183:

> "'Acquisition', as that word is used in Section 202(a)(3), means when the legatee receives his legacy in possession vested with the absolute dominion and control over it as distinguished from a contingent interest he may have had at the date of death of the testator."

Early in its history the Board was required to determine whether the practical condition of ownership should control in ascertaining when property was *acquired* within the meaning of the basis provisions of the 1918 Act. In *Appeal of City Bank Company,* 1 B. T. A. 210, the taxpayer had bid in property at a judicial sale prior to March 1, 1913; but the sale was not approved by the Court until after that date. The value at March 1, 1913, was much higher than the cost and when the taxpayer sold the property in 1920 he sought to obtain this value as the basis for computing his gain by claiming that he had acquired the property at the judicial sale prior to March 1, 1913. But the Government had held that he did not acquire the property until all contingencies were removed by the Court's approval of the sale and there-

fore his *acquisition* was after March 1, 1913, and his basis was the cost of the property. In his brief the Solicitor of Internal Revenue admitted that title related back to the date of the sale, but contended, and quite properly, that the acquisition was when "the taxpayer had an unconditional and indefeasible right to the property in question" (see, *infra*, p. 28). The Board sustained the position of the Department.

In sustaining the Department's interpretation of the term "acquisition", the Board was recognizing and yet properly limiting the application of the fundamental theory under which profits from the sale of property are considered as taxable income. As this court has repeatedly indicated, only the actual gains and losses of a taxpayer may be taxed or deducted; *Goodrich* v. *Edwards*, 255 U. S. 527, 41 S. Ct. 390; *Walsh* v. *Brewster*, 255 U. S. 536, 41 S. Ct. 392; *United States* v. *Flannery*, 268 U. S. 98, 45 S. Ct. 420; *McCaughn* v. *Ludington*, 268 U. S. 106, 45 S. Ct. 423. To tax increments in value occurring prior to the time the taxpayer obtains dominion over the property is to tax something more than his actual gain. Congress has invariably adopted this theory of measuring the gain or loss with one or two minor exceptions, such as the case of gifts where a different basis was prescribed to correct a very real and notorious abuse. It is peculiarly significant that when Congress deemed it necessary to provide that the basis of one taxpayer should become the basis of another, as in the case of donor and donee (see *Taft* v. *Bowers*, 278 U. S. 470), it devoted a separate subdivision of the statute to that purpose and employed clear and unequivocal language (Section 202(a) (2), 1921 Act). Certainly, in the absence of any clearly expressed intent on the part of Congress to prescribe a different rule, the basis for taxation should be the value of the property when for the first time complete dominion attaches, rather than some arbitrary basis such as the Department is endeavoring to apply in the present case.

The reasoning of the Department seems to approach this question from the viewpoint that the so-called exemption of

the value of bequests is to be strictly construed. But irrespective of the statute the values of bequests and devises are not income and have never been so considered. In this respect they are entirely similar to the proceeds of life insurance paid at death as to which this Court, construing Section 213(b), 1918 Act, said that the word *exempt* is used only to make clear that gross income does not include such proceeds and is not used to indicate that they would otherwise be included in taxable income. *U. S.* v. *Supplee-Biddle Hdw. Company,* 265 U. S. 189.

The value of property acquired by bequest, devise or inheritance constitutes in fact capital of the legatee or devisee. It is no doubt quite proper to treat the value of real estate and specific bequests at date of death as such capital. As to the former, it vests immediately at death, is not ordinarily a part of the estate for purposes of administration, and at death is identified definitely as going to the persons designated by will or intestate laws. As to specific bequests, both the property and the legatee are identified with each other at death. It is not subject to sale by the representative except when all other personalty is inadequate, no other legatee can possibly get it and its change in value during administration has no bearing upon the specific legatee's rights.

Altogether different, however, is that which a residuary legatee takes, particularly if he is one of several. In this case, for example, there was a gross estate of approximately $1,300,000 (R. 8). At the date of death there existed liabilities for taxes, debts, and sundry expenses in unknown amounts. Such liabilities were eventually found to be approximately $500,000 (R. 8, 9, 10, 11). It was not until such charges against the residuum were ascertained and satisfied that the existence of any residuum at all could be determined. During the process and period of administration and until the Court ordered distribution, in every practical sense, Brewster had no right to or interest in any specific item of property which constituted the residuum of the estate. He could not demand, control, enjoy or sell any property and possessed only the right to demand an hon-

est administration and eventual distribution to him of one-fifth of what might be left. *Furthermore, each item of property set apart to him in the order of distribution in fact was, and by law was required to be, charged to him at its value on the date of the order.* In no other way could an equal partition of the residuum be effectuated. Accordingly, in a very real and practical sense the value at the date of distribution, the value at which the property was charged to him, constituted his capital. To tax him upon any other basis than that value would subject him to conditions which transpired during a period when another taxpayer, the estate, was in possession and control of the property and liable to pay the income tax on any income realized from it (Section 219, Revenue Acts, 1918, 1921). To allow him a loss on any other basis would be in fact to allow a loss never sustained by him. It is altogether repugnant to any concept of income to measure Brewster's income by changes in value of the property during a period when he had no power of disposition over it.

II.

The legislative history of the statutes in question fully supports the petitioner's construction

In considering the legislative history having a bearing upon the matter in controversy, it is necessary to examine the statutory provisions with respect to gross income as well as those relating to the basis to be used in determining the gain or loss resulting from the sale of property.

The broad definition of gross income found in the first income tax statute, the Revenue Act of 1913, has not been changed in any respect here significant in the numerous revenue acts enacted to this date. In each of the acts there has been excluded from gross income and exempted from the income tax "the value of property acquired by gift, bequest, devise, or descent." The only change whatsoever occurred in the 1926 Act when the word "descent" was changed to "in-

heritance" and this change was retained in the 1928 Act. It is without significance. (Section II-B, Revenue Act of 1913; Section 4, Revenue Acts of 1916 and 1917; Section 213(b), Revenue Acts of 1918, 1921 and 1926; Section 22(b), Revenue Act of 1928.)

In all of the revenue acts, except that of 1913, in which no specific provision is found, the general rule as to basis has been that the basis for determining gain or loss from the sale of property is the cost of such property if it was acquired after March 1, 1913, and the value of such property at March 1, 1913, if it was acquired prior to that date. (Section 2(c), Revenue Acts of 1916 and 1917; Section 202(a), Revenue Acts of 1918 and 1921; Section 204(a), Revenue Acts of 1924 and 1926; Section 113(a), Revenue Act of 1928.)

Every exception or addition to that general rule has been to serve one of three purposes, namely: First, to harmonize the basis rule with other parts of the statute such as provisions relating to inventory, tax-free exchanges, tax-free corporate reorganizations and wash sales; Second, to prevent the escape from taxation of gains that Congress intended should be taxed; and, Third, to clarify the statutes.

Thus, in Section 202 of the 1918 Act appear provisions as to the basis in case of property that had been reported in inventory, property received without taxation in exchange for other property, and in tax-free reorganizations. All of these additions or exceptions fall within the first class aforementioned. In the subsequent acts the provisions regarding basis in connection with exchanges and corporate reorganizations become more elaborate as the other provisions of the statutes dealing with those subjects become more elaborate.

Under the 1918 and prior acts, there was nothing to prevent a taxpayer from making a gift to a member of his family of property greatly enhanced in value and about to be sold, thus permitting the donee to make the sale and avoid the realization of taxable gain. Accordingly, in the 1921 Act an exception to the general rule makes the basis to a donee the same as it would have been to the donor had he sold the property (Sec. 202(a) (2)). In the 1924 and subsequent

acts, this exception preventing escape from taxation is extended to property transferred in trust, other than transfers in trust by bequest or devise. (Sec. 204(a) (3), Revenue Acts, 1924, 1926.) These provisions of the 1921, 1924 and subsequent acts fall within the second class as preventing escape from taxation of gains intended by Congress to be taxed.

In the 1921 Act, subparagraph (3) of Section 202 (a) hereinbefore quoted, was added. This was for the purposes both of clarifying and harmonizing the basis provisions with Section 213, which excludes "the value of property acquired by * * * bequest * * *" from taxation as income. This provision was retained and reenacted in the 1924 and 1926 Acts. If Congress intended to adopt any such construction as the Department here urges, it would certainly have employed the obvious means of doing so by providing that the basis shall be the value at the date of death. Furthermore, when the section was reenacted in 1926 the Board of Tax Appeals had decided the *Matthieson* case, *supra,* in 1925 and held that the basis is the value at the date of distribution. (See *infra,* p. 29.) By the time the 1928 Act was passed, the Board, in the *Foster* case, had reiterated its position, the Court of Claims, in the *Matthieson* case, had followed the Board, and the District Court had decided this case, all contrary to the construction now asked by the Department. And when Congress came to re-enact the provisions here under consideration it spelled out its intention in a fashion that would leave no room whatsoever for doubt. This provision appears as Section 113(a) (5) of the Revenue Act of 1928, which specifically provides that the basis in the case of personalty acquired by specific bequest, or realty acquired by general or specific devise, or intestacy, shall be the value at the time of death, but that in *all other cases, the basis shall be the value at the time of distribution.*

In its broad definition of gross income which Congress has repeatedly reenacted without substantial change, it intended, as this Court has said, to use its power to tax income to the full extent. *Irwin* v. *Gavit,* 268 U. S. 161; *Eisner* v. *Ma-*

comber, 252 U. S. 189, 203. Adhering throughout, as it has done, to the same broad definition, Congress has not given evidence of any intention to lessen its purpose to tax all income. This is certainly true in cases where the income is derived in the form of cash proceeds from the sale of property. If, as the Department contended below, petitioner's construction results in the escape from tax of income intended to be taxed, then it is impossible to explain why Congress, in the 1928 Act, opened a way of escape, contrary to its consistent policy of closing all ways of escape. The rational explanation is that Congress never intended to tax this enhancement or to allow losses measured by corresponding declines and that the 1928 Act merely provides more definitely that which it had always intended but as to which doubt had arisen by reason of the conflicting views of the Department on the one hand and the Board of Tax Appeals, the Court of Claims, and the District Court in this case, on the other hand.

Fully in keeping with this view is the explanation of the change given by the Senate Finance Committee in its report. After reciting the confusion that had arisen the Committee goes on to say:

> "Accordingly, the Committee has revised Section 113(a) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. *In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the*

executor purchases property and distributes it to the beneficiary." (Senate Report No. 960, p. 26.) (Italics ours.)

Section 113(a) (5) of the 1928 Act deals with precisely the same subject matter as Section 202(a) (3) of the 1921 Act, here in controversy, and the identical provisions of the 1924 and 1926 Acts. Where, from a subsequent statute *in pari materia*, it may be ascertained what meaning the law makers attached to the words of a former statute, the subsequent statute will govern the construction of the earlier statute.

United States v. *Freeman*, 3 How. 556 (1845);
Alexander v. *Alexandria*, 5 Cranch 1, 8;
United States v. *Coulby*, 251 Fed. 982 (1918); Aff'd (C. C. A. 6) 258 Fed. 27 (1919);
Joy Floral Co. v. *Commissioner*, 29 Fed. (2nd) 865 (1927) (Ct. Appeals, Dist. of Col.).

In the *Alexandria* case, *supra*, Chief Justice Marshall said:

"* * *, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding the provisions of the law."

In the *Freeman* case, *supra*, this Court said:

"If a thing contained in a subsequent statute, be within the reason of a former statute, it shall be taken to be within the meaning of that statute; Lord Raym. 1028; and if it can be gathered from a subsequent statute *in pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute. (*Morris* v. *Mellin*, 6 Barn. & Cress. 454; 7 Barn & Cress. 99.)"

III.

The departmental construction is entitled to no weight in construing the statutes here involved.

The Department will no doubt urge, as it did below, the rules that long continued, consistent departmental construction is entitled to great weight; and that when a statute is re-enacted after such construction by the Department it is indicative of Congressional approval. *Provost* v. *U. S.*, 269 U. S. 443; *National Lead Co.* v. *U. S.*, 252 U. S. 140; *U. S.* v. *Falk*, 204 U. S. 143.

But there has been no long continued or consistent departmental construction of the statutes here involved; and in fact there was no published departmental regulation or ruling prior to the enactment of the 1926 Act, placing any construction on Section 202(a) (3) of the 1921 Act.

As pointed out in the legislative history above, Section 213(b) (3) or its equivalent has appeared in all of the Revenue Acts without substantial change; but Section 202(a) (3) of the 1921 Act had no equivalent in the prior acts, was re-enacted without change in the 1924 and 1926 Acts, and was revised in the 1928 Act.

Construction Under the 1913 Act.

Article 5 of Regulations 33 (1914 Edition) provides:

> "The following items shall not be included as gross income; (a) value of property acquired by gift, bequest, devise or descent during the year."

There is no other regulation on the subject. There is, however, a ruling by Commissioner Roper, contained in a letter dated December 3, 1914, to the Collector of Internal Revenue, in which he answers certain questions which were propounded in a letter from Masten & Nichols. Among the

questions was a request for advice as to how a beneficiary under a will, who sold certain securities acquired by bequest, should calculate his gain or loss. On this point, the Commissioner's letter is as follows:

> "You are advised and will so inform Messrs. Masten & Nichols, that if such securities are sold by the beneficiary at a price greater than the *appraised value placed upon them in the settlement of the estate,* the gain in value is held to be income to him and subject to tax under the provisions of the Federal Income Tax Law * * *.
>
> However, if securities belonging to an estate are sold *prior to the settlement of the estate* by the administrators or trustees at a price greater than their cost price to the estate, the amount of gain derived from the transaction is considered income accruing to the estate and subject to income tax." (Italics ours.) (Published in Corporation Trust Co., Income Tax Service, 1916, at p. 60.)

Thus, in so far as there was any evidence of departmental construction of the 1913 Act, the appraised value at the time of settlement, which can only be taken to mean the time of the order of final distribution, constituted the basis.

Construction Under the 1916 Act, and That Act as Amended by the 1917 Act.

Paragraph 44, Regulations 33 (1918 Edition), contains the following:

> *"The value of property acquired by inheritance.*—The appraised value at the time of death of the decedent is the basis for determining gain or profit upon a sale subsequent to the death after March 1, 1913."

While this regulation makes no specific reference to residuary legatees, it does make specific reference to the date of death. This, however, is not by any means free from doubt and was substantially modified in the next regulations which were promulgated under the 1918 Act. There is no other evidence of departmental construction of these acts.

CONSTRUCTION UNDER THE 1918 ACT.

Article 1562 of Regulations 45 (1919 Edition and 1920 Edition), is as follows:

> *"Sale of property acquired by gift or bequest.*—In the case of property acquired by gift, bequest, devise, or descent the basis for computing gain or loss on a sale is the fair market price or value of the property at the date of acquisition or as of March 1, 1913, if acquired prior thereto. For the purpose of determining the profit or loss from the sale of property acquired by bequest, devise, or descent since February 28, 1913, its value as appraised for the purpose of the federal estate tax, or in the case of estates not subject to that tax its value as appraised in the State court for the purpose of State inheritance taxes, should be deemed to be its fair market value when acquired. (See section 213(b) (3) of the statute and article 73.)"

It is to be noted that this regulation provides that the basis for computing gain or loss is the market price or value at the date of acquisition. The second sentence does not fix the date of acquisition but merely states a presumption of fact, namely, that the appraised value for estate and inheritance tax purposes should be *deemed* to be its fair market value when acquired. That it was intended to be merely a rebuttable presumption of fact is indicated by a memorandum of the Committee on Appeals and Review, published as A. R. M. 7, in Cumulative Bulletin No. 1, at page 38 (1919). Speaking of the regulation, the Committee said:

> "The Committee is of the opinion that this regulation does not require that the value as appraised shall be final or conclusive, but merely a presumptive value, which may be rebutted by competent evidence."

It was not until 1920 that any ruling of the Department was issued specifically fixing the value at the date of death as the basis for computing the gain or loss upon the sale of property of this character. In that year two rulings were

issued, *Solicitor's Opinion* 1012, published in Cumulative Bulletin No. 2, at page 34; and *Office Decision* No. 667, published in Cumulative Bulletin No. 3, page 52, and both of these rulings held that the basis in the case of a residuary bequest should be the value at the date of death under the 1918 Act.

However, for the first time in the 1921 Act, Congress enlarged the basis provisions of the statutes to include a specific reference to property acquired by bequest, devise or inheritance (Section 202(a) (3), *supra*), and it said:

> "The basis shall be the fair market price or value of such property *at the time of such acquisition.*"

If it was the intention of Congress, by the enactment of this provision, to adopt the departmental construction for the first time announced in 1920, in *Solicitor's Opinion* 1012, and *Office Decision* 667, then why did Congress not use the phrase "at the date of death" instead of "at the time of such acquisition"? If knowledge of departmental rulings may be imputed to Congress then this question was squarely before it at the time it enacted Section 202(a) (3) and its failure to adopt clear and direct language in support of the Government's position is significant. The term that it used, *acquisition*, has a clear meaning. It means "get as one's own", in other words, "become the owner of", and it would certainly seem that Congress intentionally used a term that would fit the varying conditions met when property is acquired by bequest, devise or inheritance, rather than fix any definite date as the time for valuation of all property so acquired.

THE CONSTRUCTION OF THE 1921 AND SUBSEQUENT ACTS.

Regulations 62, 65 and 69 promulgated under the 1921, 1924 and 1926 Acts, respectively, contain provisions substantially identical with *Article* 1566 of *Regulations* 45, *supra*. They contain nothing purporting to interpret Section 202(a) (3) or its equivalent in the subsequent acts as meaning date of death in all cases. *Furthermore, from the enactment of the 1921 Act,*

to the enactment of the 1926 Act, there was no published ruling by the Department purporting to construe Section 202(a) (3) as applicable to any case. On the other hand, there is one significant instance in which the Department contended that the word "acquire" as used in the basis provisions of the 1918 Act means to "get as one's own" or become the complete owner of property. In the *Appeal of City Bank Company, supra,* the Board held that the property was not acquired within the meaning of Section 202 of the 1918 Act until the Court approved the sale, notwithstanding the fact that title related back to the sale. The position of the Solicitor of Internal Revenue before the Board in that case is highly significant. The entire substance of his argument is contained in the following quotation from his brief filed with the Board:

> "The cases cited by the counsel for the taxpayer go no further than to state that upon confirmation of a judicial sale the purchaser's title relates back to the time when he bid the property in. This may be conceded. The fact that a sale is later confirmed can hardly be taken as proof that it necessarily would be confirmed at the time when the successful bid was made. In the present case, subject as the matter was to the approval of the court, it cannot be said that on March 1, 1913, the taxpayer had an unconditional and indefeasible right to the property in question. This unconditional and indefeasible right arose later on March 24, 1913, when the judicial sale made February 28, 1913, was confirmed by the court. Since the property in question was not *acquired* prior to March 1, 1913, its value on that date is immaterial, and the basis for determining gain upon disposition of the property in 1918 and 1920 is the price paid therefor." (Solicitor's Brief, p. 5.)

The foregoing statement of the Department's position in that case presents precisely the petitioner's contention as to what constitutes the acquisition of property in this case.

It is further significant that in 1925 the Board of Tax Appeals decided the *Matthieson* case, and it had become the law of that tribunal to which the vast majority of tax

controversies were being taken, yet when Congress enacted the 1926 Act, February 26, 1926, it did not change the existing basis provisions and did not declare an intention contrary to the Board's decision. The effect of reenactment without change after departmental construction must be at least as great in the case of reenactment without change after judicial or *quasi* judicial construction.

When the Revenue Act of 1928 was under consideration and was enacted in May, 1928, there had been decisions by the Board in the *Matthieson* and the *Foster* cases, by the Court of Claims in the *Matthieson* case, and by the District Court in this case. In that Act, Congress elaborated the basis provisions, but instead of indicating an intention contrary to those decisions it carefully spelled out its intention as in accord with those decisions.

There is no such departmental construction as will support the Government's position in this case, and had the situation been fully presented to the court below, it is not believed the court would have invoked the rule that departmental construction is entitled to great weight.

Moreover, even if there had been consistent and long-continued departmental construction, such construction could not serve to perpetuate an error. The principle is only to be applied in cases where there is real doubt as to the intention of Congress; and to recognize the principle in any other case is tantamount to holding that an erroneous construction by the Department if continued long enough ceases to be erroneous. The rule does not permit the accomplishment of any such thing. *U. S.* v. *Tanner,* 147 U. S. 661, 663; *Morrill* v. *Jones,* 106 U. S. 466; *Bowers* v. *West Virginia Pulp and Paper Company,* 297 Fed. 225 (C. C. A. 2); *U. S.* v. *Fisher,* 2 Cranch 202.

In the *Tanner* case, *supra,* the Court said, "It is only in cases of doubt that the construction given to an act by the Department charged with the duty of enforcing it becomes material". In the *Jones* case, *supra,* the principle was thus expressed, "The Secretary of the Treasury cannot by his reg-

ulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted".

IV.

The decision below is not sound; and its construction of the statute leads to inconsistencies and confusion that do not arise under the proper construction.

In the opinion below, 30 Fed. (2nd) 604, the court stated the question to be whether the petitioner *acquired*, as a residuary legatee, the securities which he sold at the date of his father's death or the date of the order of distribution. The opinion then proceeds, we respectfully insist, to accept as established, legal concepts that are controversial and highly theoretical, to assume that the practical situation demands the construction adopted whereas the contrary is true, and to assume that the departmental construction has been uniform and long continued which is not the fact.

The reasoning in the opinion may be fairly stated as based upon the following propositions:

(1) A residuary legatee under a will acquires at the instant of death that to which he is entitled. Throughout administration he has an equitable title to the assets of the estate and at distribution the specific property to which the equitable title attaches is identified and set apart to him whereupon legal title vests. The decree of distribution relates back to the date of death.

(2) Congress could not have intended that an enhancement in value during the period of administration should escape taxation; and to permit this would enable legatees to escape tax by postponing distribution in a period of rising values.

(3) The Treasury Department has, for a long time, consistently construed the acts as it did in this case.

Under Point I, B, *supra,* is discussed fully the nature of a residuary legatee's interest during the period of administration with citation of many authorities demonstrating the complete lack of control, enjoyment, and power of disposition by the legatee over any asset in the estate. That there is an acquisition by a legatee of a vested right at death has never been denied. On the other hand, petitioner submits that, except in this case below, it has never been decided that the property distributed to a residuary legatee is acquired at death. None of the authorities cited by the court in support of the proposition that a residuary acquires at death that to which he is entitled purport to hold that the property distributed, as distinguished from the mere inchoate and unattached right of the legatee, is acquired at death. On the contrary, *White* v. *Waite, supra,* directly holds that the property distributed is *acquired* at the date of its distribution, and *Alexander* v. *Alexander, supra,* goes even further by holding that real estate is not *acquired* by remaindermen until possession is obtained. Even if the court's view that a residuary legatee acquires an equitable interest in or title to assets of the estate be conceded for the purposes of argument, it merely amounts to saying that one of several residuary legatees has an undivided equitable interest in the estate which can be measured only by a part of an unascertainable residuum which may never exist.

The Court says that when there is a decree of distribution and the legatee for the first time has property set apart to him and gets possession and power of disposition, the decree relates back to the date of death. The doctrine of relation back is only a legal fiction. Primarily it serves the purpose of avoiding a break in the chain of title. For example, in the case of a judicial sale, the buyer does not get legal title and delivery until the sale is approved but his legal title is related back to the date of the sale; and, in the case of an

administrator who of necessity is appointed after death, his title relates back to the date of death. This legal fiction changes no fact, and does not in this case supply, during the period of lapse, any of the indicia of ownership (possession, usufruct, and power of disposition) that were lacking. Indeed, the doctrine is inconsistent in a case such as this with the executor's intervening title and powers. In none of the cases cited by the court on this subject was the doctrine of relation back mentioned in the opinions essential to the decision of the questions before the courts.

As to the belief of the court that it could not have been the intention of Congress to leave untaxed any enhancement of value during the period of administration and to permit residuary legatees to postpone distribution until the market should be favorable, little need be said. When the matter was squarely before Congress at the time of the enactment of the 1928 Act, it specifically adopted the date of distribution. Furthermore, the court below looked at the problem solely from the viewpoint of enhancement in value during the period of administration. It apparently failed to realize that any decline in value would result in a loss to a residuary legatee. Viewed from the standpoint of the total revenues collected any increase in taxable income is offset by the allowance of the losses.

It is asserted that residuary legatees by arbitrarily postponing the distribution until market conditions are advantageous may deprive the Treasury of a tax on the increment to which it is entitled. This argument evidently carried very little weight with Congress for in enacting the 1928 Act the date of distribution was advisedly substituted in place of the time of acquisition in determining the basis. In any event, it is hardly conceivable that in view of the innumerable factors coincident with the settlement of an estate any or all of the residuary legatees would through connivance endeavor to hasten or postpone the date of distribution on account of some possible tax advantage, particularly when any advantage must rest upon forecasting the trend of the stock mar-

ket with respect to the particular securities held for distribution. The hazard of such attempts has been and is being constantly demonstrated.

With regard to the departmental construction, it is submitted that, in view of what has been set out in Point III, the court was under a misapprehension. Unless it is believed, as the Court below seemed to believe, that practical necessity demands the departmental construction and that such construction was long continued by the department, the reasoning of the opinion lacks merit.

Considered as a whole the opinion is not persuasive if an attempt is made to apply it to the question: When did Brewster acquire the stocks which he sold? Nor is it persuasive when an attempt is made to apply it to the language of Section 202(a) (3). The opinion does not recognize the paramount purpose of the statute that the property to be valued is the identical property that was sold; and, in the light of this identity of property sold, it fails to apply the well established meaning of the word *acquisition*. Thus it departs from the problem of statutory construction actually presented, and from the question which the court propounded to itself at the outset. Moreover, the construction adopted by the Court is inconsistent with the revenue acts taken as a whole and gives rise to confusion and dilemmas that would not otherwise exist.

All of the revenue acts contemplate that a taxpayer is to be taxed upon his own income, upon gains and profits realized during the period that he was the owner of property sold. Thus, if a testator in his lifetime sold property at a gain or loss but the proceeds were transmitted at death, such gain or loss is taxable to the testator in a return filed for the last year or fraction of a year of his life. The estate of a decedent during the period of administration is a taxable entity and any gains or other income realized by it must be reported and taxed to the personal representative. (Sec. 219, Revenue Acts of 1918 and 1921.) The statute applies literally and sensibly when construed as the petitioner has

done. If the executor sells specific property, being a taxable person, he reports the gain or deducts the loss upon the basis of value at the date of death, namely, when it came to him from the decedent. If a residuary legatee sells specific property or things that were distributed to him from the residue of the estate he should report gain or deduct the loss upon the basis of the value when he acquired it. If the legatee sells before distribution his right eventually to receive a proper share of the residue, which right vested at death and is in itself property, then he reports a gain or deducts a loss, measured by the difference between the value of that right at death and the proceeds of its sale. This simple and rational application of the statute, both in its fundamental aspects and in the light of its specific language making the basis the value when acquired and exempting from tax the value of the property acquired by bequest, gives rise to no confusion.

There is nothing in the provisions of the statutes here under consideration which indicates that Congress intended to tax or allow to one taxpayer, a residuary legatee, the enhancement or decline in value of property while it was held by another taxpayer, the personal representative. On the contrary, it should be presumed that Congress intended to avoid doing any such thing and thus prevent confusion and dilemma that would otherwise result.

Consider, for example, the dilemma which arises when an executor sells property received from the decedent but buys other property all or a portion of which he eventually distributes to residuary legatees. Suppose an executor received 1000 shares of A stock which he sold and with part of the proceeds paid taxes, debts and expenses, but with the remainder purchased shares of B, C and D stock, which he eventually distributed. Under these circumstances, if the legatee is the real owner as the Court indicates, the gain realized upon the sale of A stock should be the legatee's gain and taxable to him, but the statutes are to the contrary. (Section 219, Revenue Acts, 1918 and 1921.) If value at

date of death must control then it would seem necessary to assign a value to B, C and D stocks as of date of death by apportioning to them some part of the value of the A stock at that date, but this presents both practical and legal obstacles that cannot be surmounted. Therefore, as stated in its brief below, the Department conveniently abandons the construction here urged by it and adopts a different theory, namely, that the cost to the executor becomes cost to the residuary legatee. In doing so, however, it ignores the statutory mandate that the basis shall be the "value of such property when acquired". Thus, at its pleasure, it abandons date of death as being of any significance and substitutes *cost* for *value* to escape from a dilemma due to its construction of the statute, a dilemma which cannot arise under petitioner's more rational construction.

Of necessity, when there are several residuary legatees and several classes of property, each class not susceptible of equal partition or not susceptible of partition at all, the division of property at the time of distribution must be upon the basis of its value when distributed and not its value at death. Otherwise, serious inequality would oftentimes result contrary to a testator's intentions. Suppose a case where legatee A took, for example, stocks worth $100,000 at the date of distribution but which at death were worth only $10,000; and suppose legatee B took bonds worth $100,000 both at date of distribution and date of death. If A had sold the stocks for $100,000 in 1921 the Department would have imposed a tax on $90,000, thus taking from him approximately $25,000 in taxes and, to that extent, deprive him of the value of the property acquired by bequest. But if B sold his bonds in 1921 for $100,000 the Department would take nothing from him in taxes. It is inconceivable that Congress could have intended so to thwart the intentions of a testator and so ignore the settled principles governing estates and their administration when it provided that no income tax should be imposed upon the "value of property acquired by * * * bequest * * *." On the

contrary it is not only sensible but also in keeping with all principles of law here pertinent that Congress should have ment what it apparently said, the value when *acquired* by a legatee should not be subjected to the income tax. It would be equally inconceivable that Congress could have intended to allow a loss in the converse of the above illustration.

CONCLUSION.

It is respectfully submitted that for the reasons set out above the judgment of the Circuit Court of Appeals for the Second Circuit is erroneous and should be reversed.

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